UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re SOPHIE SERRATO, Debtor.	Case No. 590-04408 Chapter 7 Adv. No. 92-5396
SUZANNE L. DECKER, Plaintiff, vs. FRANK J. VOISENAT, Defendant.	**MEMORANDUM OPINION**

I. INTRODUCTION

This adversary proceeding is one of several fraudulent transfer actions filed by the trustee arising in the Chapter 7 case of Sophie Serrato. What sets this proceeding apart from the typical fraudulent transfer action is the sophistication of the participants and their familiarity with the bankruptcy process.

Sophie is, in her own words, a "real estate consultant" in the business of "mitigation of foreclosures." At the time of trial in this matter, she operated a business known as Home Equity Line Plan (HELP) which provided consulting services to financially distressed clients attempting to preserve their homes against foreclosure sales. Sophie gave seminars on this topic. Sophie also has a law degree, but is not licensed by the State of California. In 1992, she was adjudicated a vexatious litigant pursuant to Code of Civil Procedure section 391, a finding later affirmed by the California Sixth District Court of Appeals.

Sophie has three adult children: Frank, Marc and Phyllis. Frank is the defendant in this adversary proceeding. Marc is an attorney with a bankruptcy practice, a licensed real estate broker and President of MVP Realty. Phyllis is also an attorney practicing bankruptcy law. Marc and Phyllis represented Frank as counsel in this adversary proceeding.

The trustee alleges that Sophie quitclaimed property she owned at 1918 102nd Street in Oakland, California to Frank in September of 1988 in an attempt to defraud her creditors. The trustee asserts that this transfer was one of a series of fraudulent transfers Sophie made during that time period, and that it exemplifies Sophie's decade-long practice of transferring assets to family members and friends to hide them from her creditors and from the trustee during her numerous bankruptcy cases.

II. FACTUAL BACKGROUND

In May 1980, Sophie obtained a $50,000 loan from the Small Business Association (SBA) to fund a business called Attorney Services Legal Clinic (ASLC). ASLC provided low cost services to clients in need of legal advice. Sophie's role at ASLC was to meet with potential clients, determine the legal issues they presented, and refer them to staff attorneys with particular legal expertise.

Sophie's SBA loan was secured by a lien on all of ASLC's business equipment, including machinery, furniture and fixtures, and all of Sophie's personal property. The SBA loan was also secured by Sophie's personal guarantee. As part of the guarantee, Sophie assigned to the SBA her interest in a $30,000 promissory note made by Guy West and C. West (hereafter "West note"). The West note was secured by property at 2917 Moran Road in Arnold, California which Sophie claimed was worth approximately $100,000 in 1980. She did not assign the Deed of Trust that she held on the property to the SBA.

Three months later, on August 10, 1982, the Superior Court of Alameda County entered a final judgment and permanent injunction prohibiting Sophie from operating ASLC. As part of the

judgment, Sophie stipulated to having unlawfully practiced law in California. Because she could no longer operate ASLC, the SBA did not advance any additional funds to Sophie. At that point, the SBA had funded $16,900 of the loan.

Sophie made only one payment on the SBA loan. On October 14, 1980, the loan went into collection status. Sophie testified that she felt she no longer owed the SBA any money on its loan since she had assigned the West note as collateral and had given the SBA a lien on her business and personal property, collateral she claimed was worth in excess of $90,000, in return for only $16,900.[1]

On April 28, 1983, Sophie assigned the West Note and Deed of Trust to her sister, Mercy Lopez. She did not inform the SBA of this assignment. Although Sophie did not produce the actual assignment document, she testified that she made the assignment subject to the SBA's lien.

Sophie claimed she made the assignment to Lopez because Lopez had given Sophie $16,000 at a financially difficult point in Sophie's life. The $16,000 gift purportedly came with no strings attached, however Sophie felt she should do something nice for her sister in return. She put the West note and Deed of Trust in Lopez's name, but did not tell Lopez about this assignment.[2]

Two months later, on July 27, 1983, Sophie filed a Chapter 11 case in Oakland, California. On September 2, 1983, Sophie recorded her assignment of the West Note and Deed of Trust to

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1 Sophie claimed that, "[a]t the time that the SBA made a loan to me, I paid them in full." She added that she did not understand the term "secured" in relation to the West Note and her assignment of the Note to the SBA until Marc explained it to her shortly before trial. She also claimed not to know the difference between a real property security interest and a personal property security interest.

2 Despite Sophie's assertion that the $16,000 was a gift from Lopez, when the trustee's counsel asked her at a later point in the trial why she had not listed Lopez as a creditor in her schedules, she claimed that by the time she filed her chapter 7 case in 1990 she had paid the $16,000 back to Lopez.

Lopez.[3] Sophie's Chapter 11 case was dismissed by court order entered on December 5, 1983. On March 8, 1984, Sophie filed a Chapter 13 case in Oakland, California. This case was dismissed by court order entered on November 15, 1984. On April 11, 1985, Sophie filed another Chapter 13 case in Oakland, California.

On April 11, 1985, Sophie filed another Chapter 13 case in Oakland, California. On May 14, 1985, Sophie sent the SBA an "Offer in Compromise" proposing to pay $21,000 to settle her debt. She claimed the SBA sent the form to her, asked her to fill it out, and agreed that it would compromise its debt if she filled out the form. She felt this was the only way the SBA would negotiate with her.[4] At trial, Sophie explained that although she believed she owed nothing to the SBA since its debt was oversecured, she sent to offer to "get rid of" the SBA and to get rid of the "ax over [her] head." This Chapter 13 case was voluntarily dismissed by court order entered on July 24, 1985.

Sometime between 1983 and 1986, Lopez was apparently made aware that Sophie had assigned the West Note and Deed of Trust to her, because on July 14, 1986, Lopez reconveyed the West note and Deed of Trust to Sophie.

A. Sophie Obtains An Annulment From Her Husband.

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3 When asked why she did not record the assignment at the time of the assignment, Sophie explained that she did not understand what "legal possession" was, and did not know whether she could "convey an interest" by recording the document.

4 Sophie's Offer in Compromise reads as follows:

1. Debtor under chapter 13 (3rd filing); and danger exists of being converted to CHAPTER 7, with all debt being discharged.
2. The Note which SBA holds as security has been reassigned by debtor to M. Lopez who took the note and trust deed and recorded same.
3. The default occured [sic] through no fault of debtor; SBA authorized $50K loan extended only $15-16K and Debtor had debt she anticipated paying with SBA loan and which she could not when SBA defaulted. She closed her business w/debt she could not pay. She then became ill and debt mounted more. Illness now arrested and she wants to begin a new life by paying off debt rather than being forced into CHAPTER 7 and ruining credit forever.
4. Debtor plans to leave Bay area and start fresh somewhere else.

In early 1988, Sophie and her husband Mark Davenport were in the process of a marital annulment. On March 18, 1988, Davenport filed a Chapter 7 case. Soon thereafter, Sophie and the Chapter 7 trustee became embroiled in a series of disputes regarding whether certain marital assets were community propert y.

On April 24, 1988, Sophie assigned the West Note and Deed of Trust to her 20-year-old son, Frank. Although he was not a real estate agent or broker, and "had little or no real estate experience" at that time, Frank was President of FJV Financial, a real estate and loan brokerage company.[5]

At Sophie's 2004 exam, she claimed she sold the West Note and Deed of Trust to Frank for $5,000 cash. At trial, after Frank testified that he did not know about West Note assignment, Sophie recalled the transaction differently. She explained that Frank had been in a car accident in 1988 and had received $5,000, which he had given to Sophie. Although the gift purportedly came with no strings attached, Sophie felt she should do something nice for Frank so she assigned the West Note and Deed of Trust to him, but did not tell him about the assignment. Sophie claimed not to have actually transferred anything through the assignment because the Note was already assigned to the SBA. She stated that she intended to buy back the Note from the SBA at a later time, to give the assignment value.

Two months later, on July 1, 1988, while still in the process of her annulment from Davenport, Sophie quitclaimed a condominium located at 150 Pearl Street, Unit 325 in Oakland to Frank. Frank testified that he knew nothing of the transfer.[6] Sophie explained that she put the condominium in Frank's name to keep it from her husband. She justified the transfer by

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5 The following year, in 1989, Frank and Sophie formed Sophie & Voisenat, dba FJV Financial.

6 To impeach this testimony, the trustee presented as an exhibit an amended complaint filed by Sophie and Frank against Davenport in January of 1989. In the complaint, Sophie and Frank alleged that they were the owners of the 150 Pearl Street condominium and sought to prevent a foreclosure sale. Frank's signature is on the amended complaint.

explaining that she had originally used funds from the sale of her separate property in San Leandro to purchase the condominium.

In early September 1988, the Trustee in Davenport's Chapter 7 case proposed to settle the dispute with Sophie regarding the community property nature of certain marital assets by transferring to Sophie the 150 Pearl Street condominium, a piece of property at 1918 102nd Street in Oakland, and a Mazda, in exchange for $7,500. As part of the Compromise of Controversy, the trustee had the 102nd Street property appraised. The uncertified appraisal indicated that the fair market value of the property was $25,000. The Compromise of Controversy was approved by the bankruptcy court.

B. Sophie Transfers the 102nd Street Property to Frank.

On September 15, 1988, Sophie quitclaimed the 1918 102nd Street property to Frank. The documentary transfer tax information on the quitclaim deed indicates that the property was a gift, with "no loans assumed." There was no escrow of the property, and no writing evidencing a sale of the property. When questioned, both Frank and Sophie gave inconsistent testimony regarding the nature of the transfers.

At Frank's deposition, he claimed the transfer was a gift from Sophie and that any money he received from a subsequent sale of the property was his to keep "free and clear." At trial, however, Frank recanted this deposition testimony, explaining that he had worked a double shift and had drunk a beer immediately prior to his deposition, causing him to make false statements. Frank testified at trial that he and Sophie had an oral agreement that he would turn over any proceeds from the sale of 1918 102nd Street to her. He called this arrangement "delayed consideration."

At Sophie's 2004 exam, she claimed that she sold the 102nd Street property to her son Marc in 1987 for $44,000. She claimed to have not received any proceeds from the sale because the escrow company disbursed the funds to various lienholders. During the trial, however, Sophie

admitted to putting the property in Frank's name. She asserted that the transfer was not a gift, and that Frank simply held the property for her benefit. She claimed she put it in Frank's name so he could get refinancing for it. She testified that she could not get refinancing on her own due to her bad credit. When asked why she listed the property as a gift on the quitclaim deed, she explained that "that was how they told me to put it in if I wanted to not have to pay transfer taxes."

C. Frank Sells the 102nd Street Property to Mark.

Five months later, on February 15, 1989, Frank sold the 102nd Street property to his brother Marc for $55,000. Prior to the sale, Frank testified that he obtained an appraisal showing the value of the property to be between $45,000 and $55,000. Frank testified that the apparent increase in the value of the property was due to significant improvements he made prior to the sale. He claimed that the cottage on the property had been damaged by a fire, and asserted that he had relaid all of the flooring, installed new appliances, remodeled the bathrooms, painted inside and out, put on a new roof, cleared debris, rebuilt the porch and steps, put in a new mailbox, and landscaped. However, neither Frank nor Sophie presented any evidence, other than their own testimony, to prove that these improvements had occurred.

Following the sale to Mark, the escrow company advanced approximately $5,536.96 to pay off liens against the property and $4,705 for termite repairs. Frank received two checks totaling $40,314.94. The first check was for $36,717.44. The second, following payment for termite repairs, was for $3,597.50. Frank also received a deed of trust from Mark secured by the property for $5,000, but he forgave this debt.

On February 17, 1989, Frank deposited $32,824.37 into Home Equity Line Plan (HELP)'s checking account at American Savings Bank. At trial, Sophie testified that she considered this money to be her income. She testified that the American Savings account was her account, although Frank and Marc had access to it to pay bills since she did not enjoy this task. She

claimed that she used $15,000 of the proceeds from the sale to buy more equipment for her business, and used the remainder of the money to pay off a few creditors and to buy property. She provided a check from the American Savings account dated February 26, 1989 for $3,500 made out to Kathleen Hendron. She claimed this was to purchase property at 150 Pearl Street, Unit 120 or 124. She also presented a grant deed dated March 23, 1989 from John Conley to Sophie for property she professed to have purchased at 2412 Highland Avenue.

Sophie claimed to have no additional records indicating how she spent the proceeds from the sale of the 102nd Street property. However, several checks that Marc wrote from the American Savings account around February 17, 1989 were submitted at trial attached to the back of a defense exhibit. These checks provided insight regarding where some of the income from the sale of the 102nd Street property might have been spent. For example, on February 16, 1989, Marc wrote a check for $5,021.50 to Nilda Caro. Although Caro was not related to Sophie at that time, she is now Marc's wife. Sophie claimed this was a payment she owed Caro from an investment. On February 17, Marc wrote a check to Doug Rafter for $6,739.50. Rafter is Phyllis' husband and Sophie's son-in-law. Sophie claimed this was for repayment of a personal loan. On February 21, he wrote a check to "Cash" for $2,700. Sophie claimed this was for Marc salary.

D. Sophie Files A Chapter 7 Case.

On September 14, 1990, Sophie filed a Chapter 7 case in San Jose. In her Statement of Affairs, she stated her annual income for 1988 and 1989 as $9,000 and $10,000, respectively. Despite her experience in having filed at least three other prior bankruptcy cases, Sophie explained that it was her belief that the Statement of Affairs sought her "net income." She did not mention the $32,824.37 she received from the sale of the 102nd Avenue property. She listed only the Chapter 13 case from 1983 as a prior bankruptcy case.

In Sophie's Schedules she listed total assets of $152,700 and total debts of $236,867.92.

She did not list the West note as an asset. She did not list the 150 Pearl Street, Unit 120 or 124 or the 2412 Highland Avenue property as assets. Despite her assertion that her business equipment was worth $47,000 in 1990, she listed it as having a value of only $700 and claimed it as exempt. She listed the SBA as an unsecured creditor for a $26,000 debt. She signed a declaration, under penalty of perjury, stating that this information was true to the best of her knowledge, information and belief.

On October 18, 1990, the First Meeting of Creditors was held and the Trustee filed a Report of "No-Asset" Case. On January 11, 1991, Sophie received a discharge of her debts. On March 14, 1991, the Chapter 7 case was closed.[7]

In April of 1991, while prosecuting a state court action against Sophie, attorney David McKim obtained information indicating that Sophie might have fraudulently transferred assets to family members. He contacted the trustee with this information. Soon thereafter, the trustee sought an order from the court for authority to employ McKim as special counsel for the trustee to investigate these claims, and to compel Sophie to appear at a 2004 examination. Despite Sophie's unsolicited opposition, the court granted both motions. On May 28, 1991, Sophie appeared at her 2004 examination.

In August of 1991, the trustee filed two adversary complaints for fraudulent conveyance actions. Both the trustee and trustee's counsel were apparently unaware that the main case had closed. Adversary number 91-5309 concerned the status of the West Note and Deed of Trust. Adversary number 91-5323 was filed by the trustee to set aside the transfer of 1918 102nd Avenue to Frank.

In the 91-5309 case, the trustee obtained an order from the court compelling Marc to appear at a 2004 examination. Marc brought a motion to vacate this order for lack of subject

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[7] The order closing the case is not present in the court's file, although the date of the order closing the case is entered on the docket.

matter jurisdiction. He argued that the adversary proceedings were improperly filed because the bankruptcy case was closed and the trustee had never moved to reopen the case. On February 5, 1992, the court signed an order vacating the Order of Examination for lack of subject matter jurisdiction.[8] That same day, Sophie filed a motion to dismiss adversary number 91-5309 for lack of subject matter jurisdiction.

On February 14, 1992, Sophie recorded a reconveyance of the West note from Mercy Lopez to herself. She also recorded her assignment of the note to Frank, and an assignment of the note from Frank to her friend, Rebecca Rangel.

On February 21, 1992 the trustee filed a motion to vacate the closing of the main case, or alternatively, to reopen the main case. The trustee's motion, and Sophie's motion to dismiss adversary number 91-5309, were heard on March 6, 1992. At the hearing, the trustee's counsel expressed serious concerns about the effect of dismissal of the adversary proceeding and whether further proceedings would be barred by the statute of limitations. Ultimately, the court dismissed adversary number 91-5309 for lack of subject matter jurisdiction, but granted the trustee's motion to reopen the case.

Shortly thereafter, the trustee obtained an order to employ special counsel and filed adversary number 92-5199 to determine the status of the West Note and Deed of Trust. On June 3, 1992, having received no aid from Sophie in obtaining necessary documents to ascertain Mercy Lopez' interest in the West Note and Deed of Trust, the trustee filed a "Motion to Compel Cooperation of Debtor and For Sanctions." The motion was granted, although sanctions were denied for lack of cited authority.

On July 16, 1992, the trustee commenced this adversary proceeding against Frank.[9] On

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[8] Again, this order appears on the court's docket but is missing from the file.

[9] It is unclear what became of adversary proceeding number 91-5323. The case was closed on July 21, 1992.

July 27, 1992 Sophie converted the main case to Chapter 13 and became debtor-in-possession. While acting as debtor-in-possession, she attempted to dismiss the instant adversary proceeding by filing a Notice of Dismissal. Dismissal was rejected by the Court, and the case was reconverted to Chapter 7 on March 31, 1993.

Sophie was deposed on June 30, 1993. She refused to answer any question that was put to her on Fifth Amendment grounds. Frank was deposed on August 17, 1993, but later recanted his deposition testimony.

On November 1, 1994, the trustee filed a First Amended Trial Setting Statement identifying the SBA as the creditor whose claim existed at the time of the transfer and indicating that the trustee intended to call the SBA's custodian of records as a witness at trial. **(ASK JM)** After numerous procedural disputes, including two defense motions to dismiss the case and several motions filed on the eve of trial, trial of this matter commenced on February 10, 1995. Due to the unanticipated length of the trial, closing arguments were not heard until March 21, 1997.

III. ANALYSIS

The crux of this adversary proceeding is the trustee's allegation that Sophie quitclaimed the 102nd Street property to Frank in an attempt to defraud her creditors. The trustee relies on Bankruptcy Code section 544(b) to bring this action.[10] Section 544(b) allows the trustee to stand in the shoes of a defrauded unsecured creditor to bring an avoidance action under state law.[11] The trustee maintains, in pertinent part, that Sophie's transfer of the 102nd Street property to

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[10] Because the alleged fraudulent transfer took place on September 15, 1988, two years prior to Sophie filing her Chapter 7 case on September 14, 1990, the trustee is precluded from using her avoidance powers pursuant to section 548.

[11] Section 544(b) provides that, "The trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title . . . ."

Frank was intentionally fraudulent, based on California Civil Code section 3439.04(a).[12] For the following reasons, the court agrees.

A. The Trustee's Action Is Not Barred By The Statute Of Limitations

Civil Code section 3439.09(a) requires an avoidance action to be brought within four years of the date of the alleged fraudulent transfer, or within one year after plaintiff could have reasonably discovered the transfer. Cal.Civ.Code § 3439.09(a). Here, the trustee's avoidance action was filed on July 16, 1992, within the four year statute of limitations. However, Bankruptcy Code section 546(a) imposes an overriding statute of limitations for section 544(b) actions. (In re Mahoney, l11 B.R. 914 (Bankr. S.D. Cal. 1990); In re McGoldrick, 117 B.R. 554, 560-561 (Bankr.C.D.Cal.1990).) Section 546(a) provides that an action under section 544 is barred after the earlier of either a) two years from the date of the appointment of a trustee, or b) the dismissal or close of the bankruptcy case.[13] (Emphasis added.)

Frank argues that the trustee's action is barred by section 546(a)'s statute of limitations

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[12] Civil Code section 3439.04(a) provides that:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred , if the debtor made the transfer or incurred the obligation as follows:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

Additionally, the trustee argued the transfer was constructively fraudulent based on Civil Code section 3439.05, which provides that:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

[13] Based on the version of section 546(a) as it existed in 1988. In 1994, section 546(a) was amended to provide as follows:

> An action or proceeding under section 544 . . . of this title may not be commenced after the earlier of--
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> (1) the later of --
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> (A) 2 years after the entry of the order for relief; or
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> (B) 1 year after the appointment or election of the first trustee . . . or
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> (2) the time the case is closed or dismissed.

because Sophie's chapter 7 case closed in March of 1991. This argument ignores section 350(b)'s mandate that the court shall close a case only after the estate is fully administered. Gross v. Petty (In re Petty), 93 B.R. 208, 211 (Bankr. 9th Cir.BAP 1988) (citing 11 U.S.C. §350(b)). Where the court discovers a potential asset that debtor has failed to disclose in his or her bankruptcy petition that has not been administered and that may result in the return of money to the estate, the case has not been fully administered pursuant to section 350(b) and is not properly and finally closed. Id. Accordingly, where the two year statute of limitations under 546(a) has not tolled, the trustee is not barred from bringing an avoidance action merely because the estate was closed under the mistaken assumption that it had been fully administered. Id. at 212. The trustee should not be penalized for delay where it results in part from debtor's concealment of information. Id. at 211.

In the present case, the two year statute of limitations under section 546(a) had not tolled when the trustee filed this adversary proceeding. The Chapter 7 trustee was appointed by order entered on September 19, 1990. The trustee filed this adversary proceeding twenty-two months after her appointment, on July 16, 1992. Accordingly, the trustee's action was not barred by the statute of limitations.[14]

B. The SBA's Claim Is Not Barred By The Statute Of Limitations.

Frank maintains that the trustee cannot step into the shoes of the SBA to assert an action under Civil Code section 3439.04 because the SBA's claim is barred by the statute of limitations. All parties concede that the SBA's claim is subject to 28 U.S.C. § 2415, which provides a six year statute of limitations for federal actions on contracts. Frank claims the SBA's claim is invalid since its loan went into collection status in October 1980, and the trustee did not file this action

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[14] Frank further contends that the trustee's suit should be barred by laches. California Civil Code section 3439.10 provides that principles of law and equity, including the defense of laches, apply in a fraudulent transfer action. However, the doctrine of laches does not operate as a bar to an avoidance claim that is timely under Bankruptcy Code section 546(a). In re Petty, 93 B.R. at 212.

until July of 1992, nearly twelve years later. The trustee asserts that the SBA's right of action did not accrue until 90 days after it received Sophie's 1985 "Offer in Compromise". The trustee further asserts that the statute of limitations tolled when Sophie filed her Chapter 7 case, and that this action was timely filed.

1. The SBA's Right of Action Accrued in May 1985.

In Curry v. United States Small Business Administration, the District Court for the Northern District of California considered, in pertinent part, the issue of when the SBA's right of action to collect on a promissory note accrued. 679 F.Supp.966 (N.D.Cal.1987). In Curry, the SBA loaned plaintiff $21,000 in 1970 in exchange for a promissory note secured by a deed of trust. Id. at 967. In 1974, plaintiff defaulted on the loan. Id. For the next three years, plaintiff and the SBA negotiated in an attempt to work out a suitable repayment plan. Id. at 967-968. In July 1978, the SBA wrote to plaintiff citing the defaulted status of her loan and threatened to foreclose on her house. Id. at 968. Plaintiff responded with an Offer in Compromise; however, the SBA failed to acknowledge this offer and took no further steps to foreclose for the next seven years. Id. at 969.

The Curry court observed that:

> . . . "a party is not at liberty to stave off operation of the statute [of limitations] inordinately by failing to make a demand." In such cases, "when statutorily unstipulated, the time for demand is ordinarily a reasonable time . . . [and] a matter of the parties' expectations. . . ."

Id. at 969-970 (citations omitted). The court determined that the SBA's right of action accrued 90 days after it received plaintiff's Offer in Compromise, and, accordingly, held that the SBA's claim was barred by the statute of limitations. Id. at 970. **But see Lorince** 773 F.Supp 1082

Here, as in Curry, it appears to the court that the SBA's right of action would have accrued 90 days after receipt of Sophie's Offer in Compromise in May of 1985. Between 1980 and 1985, Sophie filed three bankruptcy cases. Prior to May of 1985, Sophie testified at trial that she was that she was "negotiating" with the SBA regarding her loan. She also testified that the

SBA demanded their collateral around that time. Accordingly, the SBA had until August of 1991, six years from the time its right of action accrued, before its claim was barred by the statute of limitations. However, Sophie's filing of her Chapter 7 case in September of 1990 tolled the statute of limitations.

2. The Statute of Limitations Tolled When Sophie Filed Her Chapter 7 Case.

Bankruptcy Code § 108(c) provides that where debtor files a bankruptcy case, the applicable statute of limitations for filing an action against the debtor is tolled until the later of: a) the end of statute of limitations period, or b) 30 days after notice of termination or the expiration of the stay. Because the six year statute of limitations under 28 U.S.C. § 2415 expired in August of 1991, and Sophie's chapter 7 case was first closed in March of 1991, the trustee's action, which was filed in July 16, 1992, might at first appear to be time-barred. However, as noted previously, because there were undisclosed assets, Sophie's bankruptcy estate was never fully administered and her chapter 7 case was never properly closed for Bankruptcy Code section 350(b) purposes. See Gross v. Petty (In re Petty), 93 B.R. 208, 211 (Bankr. 9th Cir.BAP 1988). Accordingly, the trustee's action was not barred by the statute of limitations.

C. The SBA Was an Unsecured Creditor.

Frank's final argument against the trustee relying on the SBA's claim against Sophie to bring this action pursuant to Bankruptcy Code § 544(b) is that the SBA does not hold an unsecured claim, an element required by § 544(b). According to Idamari Taylor, the SBA loan officer who handled the SBA's loan to Serrato, the SBA loan was originally secured and the SBA never released its security interest. However, Taylor added that the SBA declined to foreclose on the collateral because the business and personal property securing the loan were of little or no value, and the West Note was uncollectible. Taylor noted that the SBA was unable to record the West Note because it lacked the underlying deed of trust. Taylor added that, as of September 14, 1990, the $16,900 loan had grown to a debt of $29,441.93, reflecting past due interest.

Sophie maintains that the West Note was worth $40,000, based on accrued interest and advances she made to senior lienholders on the West property. However, the trustee introduced into evidence a default judgment obtained by Guy West in 1990 setting the correct loan balance due on the West Note as of July 1, 1988 as $21,792.26. Sophie claimed that the Note was constantly in default after 1988. However, the trustee submitted into evidence nine checks from

Guy West made payable to Serrato from 1989 to 1990 for $330.33. Sophie responded that she had never received the checks although they are endorsed with the name "Sophie Serrato": she denied that the endorsement was her signature. When asked how the SBA could have foreclosed on the West Note after she transferred it to Mercy Lopez and to Frank, Serrato claimed that the transfers "excepted" the SBA's interest in the Note.

Sophie's bankruptcy schedules also conflict with her testimony. She did not list the West Note as an asset in her schedules. She claimed her business property securing the SBA loan was worth $47,000 in 1990, but listed this equipment in her schedules as having a value of $700. Overall, she testified that the SBA loan was secured by $90,000 of collateral; yet she listed the SBA in her bankruptcy schedules as an unsecured creditor with a claim of $26,000.

Because of inconsistencies in Sophie's testimony and in her bankruptcy schedules, the Court finds Sophie's testimony to be unreliable. The preponderance of credible evidence indicates that the SBA's loan was largely unsecured at the time of the transfer. Any unsecured portion of the loan at the time of the transfer became an unsecured claim. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240, 109 S.Ct. 1026, 1029 (1989). For this reason, the SBA was a creditor of Sophie's with an unsecured claim.

D. The Trustee Has Proven That Sophie Transferred the 102nd Street Property To Frank With Actual Intent To Defraud Her Creditors.

To prevail in an action, the trustee bears the burden of proving that Sophie quitclaimed the 102nd Street property to Frank with actual intent to hinder, delay or defraud her creditors, by a preponderance of the evidence. Whitehouse v. Six Corp. (1995) 40 Cal.App.4th 527, 533, 48 Cal.Rptr.2d 600, 604, citing Liodas v. Sahadi (1977) 19 Cal.3d 278, 292, 137 Cal.Rptr.635, 644, 562 P.2d 316, 325. Rarely will a debtor admit to transferring property with an actual intent to defraud creditors. Because of this difficulty in obtaining direct proof, "in most cases the evidence must of necessity consist of inferences drawn from the circumstances surrounding the transaction

and the relationship and interests of the parties." Neumeyer v. Crown Funding Corp. (1976) 56 Cal.App.3d 178, 183, 128 Cal.Rptr. 366, 369.

In enacting section 3439.04(a), the California Legislature adopted section 7 of the Uniform Fraudulent Transfer Act, which contains a list of factors, or "badges of fraud," indicative of actual intent to defraud. Lyons v. Security Pacific Nat. Bank (1995) 40 Cal.App.4th 1001, 1020-1021, 48 Cal.Rptr.2d 174, 185, citing Assem.Comm.com., 12 West's Ann.Civ.Code, § 3439.04 (1997 supp.) p. 191. The California Legislative Committee chose not to include the badges of fraud in the statute, but added them to the official comments. In doing so, the Committee noted that the presence of one or more of these badges does not give rise to a presumption of fraud, but "is merely evidence from which an inference of fraudulent intent may be drawn." Id. [15] The trustee has established that several of these badges of fraud taint Sophie's transfer of the 102nd Street property to Frank.

First, the trustee correctly points out that the transfer was between insiders. The relationship of parent and child, when coupled with other suspicious circumstances, gives rise to an inference of fraud. Wood v. Kaplan, 178 Cal.App.2d 227, 230, 2 Cal.Rptr. 917, __ (Cal.App.1960). In such cases, "the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction." Id. (citations omitted).

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[15] The Committee provided the following as non-exclusive list of appropriate factors to consider in determining the existence of actual intent to hinder, delay, or defraud a creditor: (1) Whether the transfer or obligation was to an insider. (2) Whether the debtor had retained possession or control of the property transferred after the transfer. (3) Whether the transfer or the obligation was disclosed or concealed. (4) Whether the debtor was sued or threatened with suit before the transfer was made or obligation was incurred. (5) Whether the transfer was of substantially all the debtor's assets. (6) Whether the debtor has absconded. (7) Whether the debtor has removed or concealed assets. (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. (10) Whether the transfer had occurred shortly before or shortly after a substantial debt was incurred. (11) Whether the debtor had transferred the essential assets of the business to a lienor who had transferred the assets to an insider of the debtor. Id.

Sophie and Frank freely admit that Sophie retained control of the 102nd Street property after the transfer. Sophie testified that she considered the property to be hers, that the proceeds from the sale were hers and that she put the property in Frank's name only to get refinancing. She claims to have paid for all of the purported repairs to the property. Frank, after recanting his deposition testimony, supported Sophie in all of these assertions.

Sophie and Frank actively concealed the transfer of the 102nd Street property. An agreement between parties to conceal a transfer from the public is said to be one of the strongest badges of fraud. Walton v. First National Bank, 13 Colo. 265, 22 P. 440 (1889). There was no writing evidencing a sale of the 102nd Street property to Frank, and no escrow. At her 2004 exam, Sophie testified that she sold the property to Mark in 1987 and that all funds were disbursed to lienholders. When asked about the transfer at her deposition, Sophie refused to answer the question on Fifth Amendment grounds. Moreover, the transfer took place during Sophie's annulment, where, in a six month period, she put the West Note, the Pearl Street condominium and the 102nd Street property in Frank's name.

Sophie was threatened with suit before she made the transfer. She testified at trial that many of the creditors she listed in her bankruptcy schedules were actually creditors of her ex-husband. She listed them because "I just did not want to be part or sued for something that he had done."

Sophie carried out a practice of concealing assets. She transferred assets to other persons without telling them. She put the West Note in Mercy Lopez' name without telling Lopez. She filed a chapter 11 case two months later. She put the Pearl Street condominium in Frank's name without telling him. She testified at trial that did this to keep the condominium from her ex-husband. She also transferred the West Note to Frank without telling him. In addition, Sophie failed to list assets in her bankruptcy schedules. She failed to list the second Pearl Street condominium or the 2412 Highland Avenue property as assets, and made no mention of the

$32,824.37 she obtained from the sale of the 102nd Avenue property. Finally, Sophie refused to provide a straightforward accounting of her assets. When asked about the status of certain assets at her 2004 examination, she gave untruthful or deceptive answers. At her deposition, she refused to answer any questions on Fifth Amendment grounds.[16]

Sophie received no consideration from Frank in return for the quitclaimed property.[17] The

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[16] As further evidence of Sophie's practice of concealing assets, the trustee submitted as an exhibit a stipulation between Sophie and Davenport purporting to establish the community or separate nature of certain marital assets. The stipulation is unsigned. Sophie claims to have no idea who prepared it, although it provides that Davenport's training and education are community assets because, "I trained Mark, allowed him not to have to worry about money--he simply took the training I gave him [sic] the guidance of a seasoned professional to learn of business, marketing, etc. I ran the business while he concentrated on learning which was to enure to community benefit." Significantly, the stipulation also explains that the Pearl Street condominium is Sophie's separate property because, "[a]lthough the property was placed in only Mark Davenport's name, this was done for the purposes of concealing Sophie's assets."

[17] Frank contends that the 102nd Street property was overencumbered when Sophie transferred it to him in September of 1988 and that his agreement to take on the debt constituted consideration. He points out that an appraisal obtained by the trustee in Mark Davenport's Chapter 7 case stated the fair market value of the property in June of 1988 as $25,000. He also testified that he believed the property was worth between $17,000 and $20,000 in 1988.

Sophie testified that at the time she transferred the property to Frank, it was subject to $36,500 in liens. These liens were: a $6,500 mechanic's lien in favor of G & H Construction; a $9,000 child support lien in favor of Dorma Acker; a $16,000 first deed of trust held by Frances and George Clemons; tax liens in excess of $3,000 and refuse liens in excess of $2,000.

To support the existence of these liens, Frank submitted as an exhibit a preliminary title report dated June 29, 1988. However, after careful review, the court found the title report to be inconclusive and unpersuasive. It indicated that G & H Construction received a grant deed, possibly in satisfaction of its mechanic's lien, in March of 1987, but failed to obtain an estoppel affidavit or reconveyance. The title report contained no mention of Acker's purported child support lien. Instead, Frank attached a demand letter from Acker's attorney, and an unsigned document authorizing the title company to withhold $9,224.00 from escrow to be paid to Acker's attorney. The title report also indicated that the Clemonses assigned their interest in the first deed of trust to Mark Davenport on January 27, 1987. **Check this with Judge Morgan to see if she agrees with your reading of the title report.**

The escrow closing statement from Frank's sale of the property to Marc indicates that the escrow company paid only the tax liens and refuse liens on the property. There was no evidence indicating that the property was sold subject to the G & H mechanic lien, the Acker child support lien or the Clemons deed of trust. For these reasons, the court concluded that the property was not overencumbered when Sophie quitclaimed it to Frank.

quitclaim deed states that the property was a gift. There were no funds exchanged, and Sophie maintains that Frank merely held the property for her benefit.

Compounding these six badges of fraud is the fact that Sophie and Frank's testimony was entirely unreliable. Their credibility was damaged by numerous inconsistencies between the testimony they gave during discovery and the testimony they presented at trial.[18] In addition, the court found Sophie's claimed ignorance of real estate transactions, security interests and bankruptcy procedure to be highly disingenuous in light of her business as a real estate consultant "in the business of mitigation of foreclosures," and her legal education.

The evidence clearly establishes that when Sophie quitclaimed the 102nd Street property to Frank, her intent was to conceal her ownership of the property, to cloud up title, and to defraud her creditors. The court is satisfied that the trustee has met her burden of proving actual fraud under Civil Code section 3439.04.

D. The Trustee Can Recover the Value of the Entire Transfer.

Although Civil Code section 3439.07 limits a creditor's recovery in a fraudulent transfer action to the amount necessary to satisfy the creditor's claim, this section is not controlling. The Bankruptcy Code separates "the concepts of avoiding a transfer and recovering from the transferee." In re Acequia, Inc., 34 F.3d 800, 808 (Bankr. 9th Cir.1994) (citing H.R.Rep. No. 595, 95th Cong. 1st Sess. 375 (1977). Once the trustee has demonstrated her right to recovery under state law, she is required to establish the amount of recovery pursuant to section 550(a) of the Bankruptcy Code. Id.

Section 550(a) provides that:

> . . . to the extent that a transfer is avoided under section 544 . . . , the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so

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[18] Parenthetically, the court notes that when Frank and Sophie were asked to identify their signatures on certain documents at trial, they gave similarly evasive responses. Frank stated that, "my signature doesn't look like that now, but it might have at that time." Sophie stated "Well, I don't sign it like that anymore, Your Honor, so I'm not sure if this is my signature or not."

orders, the value of such property, from--
(1) the initial transferee of such transfer . . . ; or
(2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a). The Ninth Circuit Court of Appeals has held that under this section, that "[a] transaction that is voidable by a single, actual unsecured creditor [under section 544(b)] may be avoided in its entirety, regardless of the size of the creditor's claim." Id. at 809, citing Harris v. Huff (In re Huff), 160 B.R. 256, 261 (Bankr.M.D.Ga.1993)); see also Moore v. Bay, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133 (1931).

In the present case the trustee seeks to recover from Frank $45,314.94, which she claims is the value of Sophie's equity in the property. Technically, the recoverable "value" of property under section 550(a) refers to the fair market value. **(Need to research where FMV of property exceeds debtor's equity in the property.)**

Here, the best estimate of the "value of the property," Sophie's equity in the property, was the $40,314.94 Frank received from escrow after selling the property to Marc.[19]

VI. CONCLUSION

Because the Court finds that the trustee has met her burden of proving that Sophie fraudulently transferred the 102nd Street property to Frank with an actual intent to defraud her creditors, the trustee is entitled to recover $40,314.94, the value of Sophie's equity in the property, from Frank Voisenat.

United States Bankruptcy Judge

[19] Section 550(b)(1) provides that the trustee may not recover under section 550(a) from a transferee "that takes for value. . . , in good faith, and without knowledge of the voidability of the transfer avoided . . . ." The court finds, based on the evidence presented at trail, that Frank did not take the 102nd Street property for value, or in good faith, and that Frank had full knowledge of the voidability of the transfer.